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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

CURTIS CAMPO, JR.
Plaintiff-Petitioner

vs.

ELECTRO-COAL TRANSFER CORPORATION INC.
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

Are the terms "seamen", as used in the Jones Act 46 U.S.C.A. 688, and "member of the crew of any vessel", as excluded from coverage under the Longshore and Harbor Workers'Act 33 U.S.C. 902 (B) (G) equivalent and synonymous terms which designate one and the same classification of maritime employee?

II.

If the terms are synonymous and designate one and the same classification of maritime employee, is not the matter of seaman status under either act a question of fact for the trier of fact?

III.

Is a laborer who is engaged in one of the listed occupations of the Longshore and Harbor Workers' Act precluded from Jones Act rights and remedies as a matter of law because he is engaged in the type of work described in the listed occupations, or does an evidentiary basis that he is a seaman under the exception entitle him to his right to trial by jury on seaman status and Jones Act rights and remedies?

IV

In applying and interpreting the Longshore and Harbor Workers' Act, should not the court first apply the exception to the statute to achieve congressional intent to exclude seamen who have Jones Act rights and remedies from coverage under the Longshore and Harbor Workers' Compensation Act?

QUESTIONS PRESENTED FOR REVIEW (continued)

V

Did the 1972 amendments to the Longshore and Harbor Workers' Compensation Act save remedies available under the Jones Act for persons otherwise subject to the Longshore and Harbor Workers' Act who are seamen and members of a crew of a vessel?

LIST OF PARTIES

The following are the parties to this proceeding:

Curtis Campo
Plaintiff-Petitioner

Electro-Coal Transfer Corporation
Defendant-Respondent

National Union Fire Insurance Company
of Pittsburg Pennsylvania
Intervenor

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TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

DECISIONS BELOW 1

JURISDICTION 1

STATUTES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

REASONS WHY WRIT SHOULD BE GRANTED 9

ARGUMENT 11

CONCLUSION 24

PROOF OF SERVICE 26

APPENDIX "A" A-1
Opinion of the U.S. Fifth Circuit Court of Appeals

APPENDIX "B" A-6
Opinion of the United States District Court Eastern District of Louisiana Section

APPENDIX "C" A-15
Denial of Rehearing U.S. Fifth Circuit Court of Appeals

TABLE OF AUTHORITIES

Cases **Page**

Ardoin v. J. Ray McDermott, 641 F.2d 277 (5th Cir. 1988) 14

Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986) 11,22,23,24

Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) 8

Butler v. Whitman, 78 S.Ct. 734, 356 U.S. 281 11,12

Carumbo v. Cape Cod S.S. Company, (1st Cir. 123 F.2d 891) 11

Desper vs. Starved Rock Ferry, 342 U.S. 187, 72 S.Ct. 216 11,22

Gahagan Construction Corporation v Aramao, 165 F.2d 301 (1st Cir. 1948) 12,13

Gianfala v. Texas Company, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1958) 11,12.13

Grimes v. Raymond Concrete, 356 U.S. 252, 78 S.Ct. 687 10,11,14,16,17

LeGros v. Panther Services Group, Inc., 863 F.2d 345 (5th Cir. 1988) 10,19.20,21

McDermott, Inc. v. Boudreaux, 679 F.2d 452 (5th Cir. 1982) 10,17,18,19,21

Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747 (1944) 10,14,15,16,17

Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959) 12,13

TABLE OF AUTHORITIES (continued)

Cases Page

Pizzitolo v. Electro-Coal Transfer, 812 F.2d 977 (5th cir.), cert. den. 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988) 9,10,17,19,20,21,24

Senko v. LaCrosse Dredging Corporation, 352 U.S. 370, 77 S.Ct. 415 11,12

South Chicago Coal & Dock Company v. Bassett, 104 F.2d 522 (7th Cir. 1939), 309 U.S. 251, 60 S.Ct. 544 (1940) 11,12,13,23

Summerlin v. Massman Construction Company, 199 F.2d 715 (4th Cir. 1952) 12,13

Wilkes v. Mississippi River Sand & Gravel Company, 202 F.2d 383 (6th Cir. 1953) 12

STATUTES

28 U.S.C. 1254(1) 1

28 U.S.C. 2101(F) 1

33 U.S.C. 902(3)(G) i,2

46 U.S.C. 688(A) i,2,3

OTHER AUTHORITIES

73 AM Jur 2d §312 24

DECISIONS BELOW

The opinion of the United States Court of Appeal, Fifth Circuit, is unreported and is reproduced in Appendix A.

The order and memorandum of the United States District Court, Eastern District of Louisiana, is unreported and is reproduced in Appendix B.

JURISDICTION

This Petition seeks review of the judgment of the United States Court of Appeal, Fifth Circuit, entered on the 23rd of July, 1989.

Petitioner thereafter petitioned the court for rehearing en banc. On September 7, 1990, the Court of Appeal denied Petitioner's request for rehearing en banc.

Petitioner obtained a stay of mandate pending application for writs to the United States Supreme Court. On October 5, 1990, the Fifth Circuit granted a stay of mandate up to and including November 5, 1990.

This Petition is timely filed pursuant to 28 U.S.C. 2101(F). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES PRESENTED FOR REVIEW

JONES ACT

Title 46, Section 688
Recovery for Injury to or Death
of a Seaman

(a) Application of Railway Employees Statutes; Jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

LONGSHORE AND HARBOR WORKERS' ACT

Title 33, Section 902
Definitions

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include. . .

G. A master or member of a crew of any vessel.

STATEMENT OF THE CASE

Pursuant to Jones Act jurisdiction 46 U.S.C. 688 (a), petitioner filed a suit against his employer, Electro-Coal Transfer Corporation, for damages resulting from injuries sustained on February 22, 1986, while performing work as an operator/trainee in the service of the vessel, THE AUDREY PEARSON, a tug boat owned and operated by Electro-Coal Transfer Corporation.

Electro-Coal defended on the basis that the Longshore and Harbor Workers' Compensation Act was Campo's exclusive remedy.

National Union Fire Insurance Company intervened for compensation paid Campo, pursuant to the Longshore and Harbor Workers' Compensation Act.

Campo was denied seaman status because he loaded and unloaded vessels; the fact that he loaded and unloaded vessels as a member of a crew of an indentifiable fleet of vessels, whose purpose it was to load and unload vessels not withstanding.

Electro-Coal, Campo's employer, operates a marine terminal which spans three miles along the Mississippi River, 40 miles south of New Orleans.

Vessels engaged in commerce come into the terminal to be loaded and unloaded. To load, unload and transload vessels, Electro-Coal maintains many types of vessels all in constant navigation and commerce—four harbor tugs, a floating work derrick, a general purpose cargo operating barge, various shuttle barges and breasting barges used in positioning of barges which are being loaded, unloaded, and transloaded.

Petitioner worked aboard all of these vessels loading and unloading them and performing various navigational functions as well as maintaining the vessels' seaworthiness.

Electro-Coal classifies its employees into two categories—the operations division and the harbor boat division. Both divisions do shift work and all employees come and go each day.

The harbor boat division is composed of individuals specifically referred to as boat captains and deckhands who are permanently and continuously assigned to a designated harbor tug. One boat captain and one deckhand are assigned to each of the four tug boats continuously during a shift. They enjoy both the factual and legal permanency requirements of the Jones Act.

The other vessels owned and controlled by Electro-Coal have no specific continuous crews aboard them in a 12 hour shift. All, however, are manned by personnel from the operations department who are classified as Laborer 1, Laborer 2, Laborer 3, and Operator/Trainee; all of whom enjoy legal permanency with the fleet though somewhat less permanency with each vessel than the captain and the deckhand aboard each harbor tug enjoy. All also share the same hazards of the Mississippi River daily.

The continuous assignment of one captain and only one deckhand to a harbor tug is obviously a division of labor for maximum efficiency and economy. Harbor tug tasks requiring more than one deckhand are performed by operator/trainees.

Electro-Coal's marine terminal could not function without the harbor tugs and special purpose vessels, and

the harbor tugs could not complete their respective missions of transferring vessels for loading and unloading without the operations crew assisting the captains and deckhands of the tugs.

Indeed, all vessels, save the harbor tugs, are manned for specific periods of time and for specific purposes by members of the operations division personnel.

Petitioner's activities consisted of operating dockside equipment, as well as equipment aboard vessels. He engaged in dock to vessel, and vessel to dock loading and unloading.

Petitioner engaged in vessel to vessel transfers, both on the Mississippi River and in the Gulf of Mexico, from vessels designed to transfer cargo mid-stream in the Mississippi and in the Gulf—clearly the work of a status seaman.

The vessels from which petitioner loaded and unloaded were designed to load and unload, and he contributed to their mission and performed many functions daily which have been construed as navigational functions for vessels at anchorage as well as in navigation:

1. Petitioner boarded the tugs to *assist* the tugs in opening and closing roll-top covers on barges.

2. Petitioner *assisted* the harbor tugs in positioning their barges.

3. Petitioner *tied* and *untied barges* for the harbor tugs, *assisted* the harbor tugs in making and breaking tows, and spotted river barges for the tugs.

4. With regard to the fleeted barges, petitioner conducted general housekeeping duties aboard, tied and untied them, opened and closed their covers, pumped ballast, and maintained the hog and sag during loading.

5. Petitioner maintained hydraulic winches to which barges were attached.

6. Petitioner controlled the breasting barge and the shuttle barge used in the barge haul assembly while unloading two barges simultaneously.

On February 22, 1986, petitioner was called in for overtime work.

To start the operation, roll-top covers on phosphate barges had to be opened. This was to be accomplished by the harbor tug whose mission it was to open the roll-top covers with a complement of two men—one, a deckhand by job title from the harbor boat division, the other, an operator/trainee by job title from the operations division.

Petitioner positioned himself on the barge and his coworker positioned himself on the tug. The two then ran lines back and forth between the tug and the barge, each securing and unsecuring lines as needed as the barge covers were opened, each subjected to the same perils of the Mississippi River. It was in this operation in which petitioner was injured.

At the conclusion of the testimony of status witnesses, the trial court entertained a motion for a directed verdict which was granted, despite the fact that plaintiff had not rested.

The court ruled that there was no way that

reasonable minds could differ, that petitioner was a longshoreman, and that the case would not be given to the jury.

Evidence had been presented that Electro-Coal is not a stevedoring enterprise but rather operates a marine terminal and that no one at Electro-Coal is classified as a longshoreman nor do any of the employees belong to the Longshoreman's Union.

Evidence had also been presented on the issue of seaman status. The court did not allow the matter to go to the jury despite the fact that the employer/employee relationship existed between Campo and Electro-Coal, that Electro-Coal owned the tug and controlled the barge, and further that on the evidence presented the following questions could be answered affirmatively:

1. The vessels upon which petitioner worked were in navigation.

2. Petitioner had a more or less permanent connection with an identifiable fleet of vessels owned and controlled by Electro-Coal.

3. Petitioner contributed to the mission of said vessels and their well being at anchorage.

Plaintiff appealed the judgment of the court.

On July 23, 1990, circuit Judge Duhe', writing for the Panel, affirmed the District Court's grant of a directed verdict and held that Campo is foreclosed from seeking Jones Act seaman status, because he is covered under the Longshore and Harbor Workers' Compensation Act rendering the member of a crew exception to the Longshore

and Harbor Workers' Act inoperative.

From the Panel's citation of *Boeing Co. vs. Shipman*, 411 F.2d 365, and quotation from *Boeing* in support of its ruling, it must be assumed that the Panel concluded that there was a mere scintilla of evidence and no substantial evidence posing questions of fact for the jury.

Howsoever, in support of its legal conclusions and to demonstrate the lack of evidence, the Panel recited proven facts which demonstrate substantial evidence over which reasonable minds could differ and different inferences drawn.

The Panel, in its opinion, stated:

> "The operations department personnel board tugs, barges and special purpose vessels to position barges and to *assist the harbor tugs* in opening and closing barge roll-top covers used to protect cargo in the barges."
>
> "Campo's position required that he conduct general housekeeping duties aboard the barges.
>
> Specifically, he had to tie and untie barges during the loading and unloading process, to open and close barge cargo covers, to keep the barges clean, to ensure that the barges did not take on water, to pump ballast, and to maintain hydraulic winches to which the river barges to be loaded and unloaded are attached.
>
> In a 12 hour shift, Campo worked with as many as 20 barges and spent as much as 40 percent of the time tying and untying barges. Campo also *assisted* harbor tugs in making and breaking tows, spotting river barges, and opening roll-top covers of barges."

The uncontroverted substantial facts recited by the Panel establish that Campo was injured in the service of vessels in navigation to which he was more or less permanently assigned, and to whose mission he contributed and raised many questions of fact for the jury.

The facts recited by the Panel are sufficient to support a finding of fact that petitioner, an operator/trainee by job title, was a de facto deckhand.

The facts recited by the Panel are also sufficient to support a finding of seaman status as a matter of law.

REASONS WHY WRIT SHOULD BE GRANTED

A writ of certiorari should be granted to review the decision of the United States Fifth Circuit Court of Appeal for the following reasons:

1. The Fifth Circuit's misconstruction of the 1972 amendments to the Longshore and Harbor Workers' Act as set forth in *P..zitolo v. Elecro-Coal Transfer*, 812 F.2d 977 (5th Cir.) cert. den. 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), has resulted in the Circuit's sanctioning a departure from the usual course of judicial proceedings in Jones Act seaman status claims.

The Fifth Circuit has ignored this Court's prior decisions which hold that seaman status under either the Jones Act or the Longshore and Harbor Workers' Act is a question of fact for the trier of fact.

Seamen's claims are being summarily dismissed as a matter of law where claimants are engaged in the occupations set forth in the illustrative listing in the 1972 amendments to the Longshore and Harbor Workers' Act or have

job titles similar to those in the illustrative listing of the Act.

The Fifth Circuit's departure and conflicts with the decisions of this Court warrant an exercise of this Court's supervisory powers.

This departure also creates intracircuit as well as intercircuit conflicts.

2. The Fifth Circuit's opinion in *Pizzitolo v. Electro-Coal* decided a federal question in a way in conflict with the applicable decisions of this Court in *Norton v. Warner Co.*, [321 U.S. 565, 64 S.Ct. 747 (1944)] and *Grimes v. Raymond Concrete*, [356 U.S. 252, 78 S.Ct. 687], which have previously decided the same federal question and which cases hold that Jones Act rights and remedies are saved for seamen who would otherwise be subject to the Compensation Act by virtue of the Act's "master or member of a crew" exception.

3. The Fifth Circuit's interpretations of the 1972 amendments to the Longshore and Harbor Workers' Act as to the method of analysis to be used in determining seaman status are varied and in conflict with each other as well as with the decisions of this Court and other federal circuits as reflected in:

McDermott, Inc. v. Boudreaux, 679 F.2d 452 (5th Cir. 1982).

Pizzitolo v. Electro-Coal, supra.

LeGros v. Panther Services Group, Inc., 863 F.2d 345 (5th Cir. 1988).

4. This Court has not as yet addressed the issue as to whether or not Congress intended, by the 1972 amendments to the Longshore and Harbor Workers' Act, to foreclose from seeking Jones Act rights and remedies as a matter of law those persons who work in the occupations set forth in the illustrative listings or have job titles similar to those in the illustrative listings.

5. Seamen's rights and remedies are further complicated and are being lost in the Fifth Circuit by its ruling in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), which is in conflict with this Court's decision in *Desper v. Starved Rock Ferry*, 342 U.S. 187, 72 S.Ct. 216.

ARGUMENT

SEAMAN STATUS: QUESTION OF FACT FOR THE FACT FINDER

This Court has repeatedly stated that whether or not a maritime worker is a seaman is a question of fact for the trier of fact: *Senko v. LaCrosse Dredging Corp.*, 350 U.S. 370, 77 S.Ct. 544 (1940); *Gianfala v. Texas Company*, 357 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1958); *Butler v. Whitman*, 78 S.Ct. 734, 356 U.S. 281; *South Chicago Coal & Dock Company v. Bassett*, 104 F.2d 522 (7th Cir. 1939), 309 U.S. 251, 60 S.Ct. 544 (1940); and *Grimes v. Raymond Concrete*, 356 U.S. 252, 78 S.Ct. 687.

Both in *Butler* and *Gianfala*, this Court approved the First Circuit's test of seaman status as set forth in *Carumbo v. Cape Cod S.S. Company* (1st Cir. 123 F.2d 891).

In *Senko*, this Court reversed the appellate court of the State of Illinois which had reversed a jury verdict based on minimal evidence. The evidence, though minimal,

supported the verdict, and *Senko* was reversed and remanded for reinstatement by this Court.

In *Butler,* the plaintiff's evidence had an evidentiary basis for a finding of seaman status. This Court, in a per curium, reversed the Fifth Circuit's affirmance of the district court's grant of a directed verdict, again citing *Senko, Gianfala, South Chicago,* and *Carumbo.*

In *Gianfala,* the Fifth Circuit reversed a jury verdict finding seaman status. This Court, in a per curium, reversed the Fifth Circuit, citing four cases: *South Chicago Coal & Dock Company v. Bassett,* 104 F.2d 522 (7th Cir. 1939), 309 U.S. 251, 60 S.Ct. 544 (1940); *Summerlin v. Massman Construction Company,* 199 F.2d 715 (4th Cir. 1952); *Wilkes v. Mississippi River Sand & Gravel Company,* 202 F.2d 383 (6th Cir. 1953); and *Gahagan Construction Corporation v. Aramao,* 165 F.2d 301 (1st Cir. 1948).

South Chicago involved a compensation claim tried to the deputy commissioner who was, by virtue of Congressional designation, the trier of fact. While the evidence in *South Chicago* could have supported an inference of seaman status, this Court pointed out that it was the function of the reviewing court to determine whether the judgment of the trier of fact was supported by the evidence and not to substitute its judgment.

The Fifth Circuit had failed to give effect to the law as Congress had written it.

After its reversal in *Butler* and *Gianfala,* the Fifth Circuit in its next succeeding seaman status case, *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959), made a complete analysis of the Gianfala per curium.

"SEAMAN" DEFINED

Offshore v. Robison involved a Jones Act claim by an oil field roughneck engaged in offshore oil exploration. The jury verdict finding seaman status was affirmed by the Fifth Circuit.

In its analysis of *Gianfala*, the Fifth Circuit arrived at its test of seaman status.

In *Robison*, the Fifth Circuit considered what is required in law to constitute a maritime worker, a seaman, and a member of a crew, and whether or not that issue was a question of fact for the court or the jury.

It concluded that this Court cited *South Chicago* and *Wilkes* for the legal principle that whether or not a man is a seaman is a question of fact for the trier of fact, and further that this Court cited *Summerlin* and *Gahagan* for the legal definition of "seaman" and concluded that whether or not a maritime worker is a seaman depends upon: (1) whether the vessel was in navigation, (2) whether there was a more or less permanent connection with the vessel, and (3) whether the worker was aboard primarily to aid in navigation.

The third part of the definition was construed to mean that if the worker was aboard to contribute to the operation and welfare of the vessel, he was a seaman.

The Fifth Circuit concluded further that if there was evidence reasonably tending to support the finding of seaman status, that it was a question of fact to be decided by the jury.

Out of the Fifth Circuit's analysis of the *Gianfala* per

curium, it concluded that under the Jones Act, judicial appraisal of the proof to determine whether a jury question is presented is narrowly limited to the single inquiry, "*whether with reason the conclusion may be drawn that the claimant was a seaman and a member of crew of a vessel.*"

Out of the Fifth Circuit's analysis of *Gianfala*, the test of seaman status in the Fifth Circuit was conceived.

"*There is evidentiary basis for a Jones Act claim to go to the jury:*

1. If there is evidence that the injured worker was assigned permanently to a vessel, including a special purpose structure not usually employed as a means of transportation by water, but designed to float on water or perform a substantial part of his work on the vessel.

2. If the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission or to the operation and welfare of the vessel in terms of its maintenance during its movement or during anchorage for future trips. Id. 779.

In *Ardoin v. J.Ray McDermott* [691 F.2d 277 (5th Cir. 1981)], the Fifth Circuit interpreted the word "vessel" to mean "fleet of vessels."

LONGSHORE AND HARBOR WORKERS' ACT SAVES SEAMEN'S RIGHTS AND REMEDIES TO THOSE OTHERWISE COVERED BY THE ACT

In both *Norton* (supra) and *Grimes* (supra), the law was given effect as Congress had written it.

Norton, the deputy commissioner, had sued Warner, the employer of Rusin, the bargeman who was the sole employee on a barge, to enforce a compensation order based on the deputy commissioner's finding that Rusin was a harbor worker. The appellate court reversed the award.

The question in *Norton* was whether or not Rusin was entitled to compensation under the Longshore Act for injuries received when a capstan bar, which he was using to shift a barge, pulled out and struck him on the chest and caused him to fall.

This Court granted writs and held that Rusin's entitlement to compensation turned on whether or not he was a "member or master of a crew of a vessel." If he was, he was not entitled to compensation as such persons are excluded from the coverage of the Longshore Act.

Aboard the barge Rusin did necessary pumping, watching and other emergency duties. His duties consisted of taking general care of the barge, including taking care of the lines at dock, tightening or slacking them as necessary, repairing leaks, pumping out the barge, taking lines from tugs, responding to whistles from tugs, putting out navigational lights and signals, taking orders from the tug boat when being towed and moving the barge at piers by the capstan.

Under the Longshore Act, the deputy commissioner has full power and authority to hear and determine all questions in respect to claims for compensation.

Also under the Act, the federal district courts have the power to suspend or set aside, in whole or in part, compenation orders if not in accordance with the law.

In *Norton*, this Court reversed the district court

because of an error of law in the misconstruction of a term of the Act - the exception.

It was pointed out by this Court that it was never Congressional intent to bring under the Compensation Act by whatever title persons who are seamen.

This Court, in *Norton*, further pointed out that Jones Act rights and remedies were recognized to be basic rights which are superior to the relief afforded by the Longshore Act, and that where Congress has provided, those basic rights shall not be withheld from the class or classes of maritime employees. It is the Court's duty, on judicial review, to respect a command and not permit the exemption to be narrowed whether by administrative construction or otherwise.

Rusin performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels as did petitioner. Rusin, as did petitioner, had a permanent attachment to the vessel or vessels which commonly characterizes "crew."

This court, in *Grimes*(supra), addressed the same issue. This Court held that the Defense Basis Act, which incorporates the Longshore Act, saves remedies available under the Jones Act for benefit of persons otherwise subject to the Defense Basis Act who are also members of a crew of any vessel.

CONFLICTS WITHIN THE CIRCUIT

The Fifth Circuit is in hopeless conflict with itself, with other circuits and with the United States Supreme Court.

Jones Act rights and remedies are being denied as a matter of law and lost to the perils of summary judgment and directed verdict upon a strained construction of the 1972 amendments to the Longshore Act without regard to legislative intent.

This departure did not occur until the Fifth Circuit affirmed a lower court in *Pizzitolo v. Electro-Coal* in 1987, some 15 years after the Act's amendments.

Not only is *Pizzitolo* in conflict with this Court's decisions in *Norton v. Warner Co.* and *Grimes v. Raymond Concrete,* but it is also in conflict with the Fifth Circuit's status test in *Robison* and with the circuit's opinion in *McDermott, Inc. v. Boudreaux,* 679 F.2d 452 (5th Cir. 1982).

In 1982, ten years after the amendments to the Longshore Act in *McDermott,* an ALJ's findings, affirmed by the Benefits Review Board, that a pipeline welders' widow was entitled to compensation benefits under the Compensation Act was reversed by the Fifth Circuit as a matter of law. In *McDermott,* the barge repairman welder was excluded from coverage under the Longshore Act on sufficient evidence to support a finding that the pipeline welder, who died of a heart attack, had a more or less permanent connection with a vessel for purposes of determining whether he was a member of a crew.

In *McDermott,* the court emphasized that the *Robison* test of seaman status is to be used not only in deciding whether a case goes to the jury in a Jones Act case dispute, but also in delimiting the power of the fact finder to deny or confer such status.

The court went on to say that the *Robison* test of

seaman status is fully applicable under the Longshore Act.

In *McDermott*, the Fifth Circuit reversed the ALJ's findings because he failed to apply the legal standard used in the circuit to review crew member status:

> "This court has concluded that the same test is to be applied to ascertain whether a person is a seaman for purposes of Jones Act jurisdiction or as a member of a crew of a vessel for purposes of Longshore and Harbor Workers' Act jurisdiction." *Id.* 455.

"Seaman" as used in the Jones Act and "members of the crew" as excluded from the Longshore Act are equivalent terms. *Id.* 455.

The two-part *Robison* version was introduced as a threshold by which plaintiffs could avoid summary judgment denying seaman status.

> "Considering *Robison's* longstanding and vital importance to this Court's interpretation of the Longshore and Harbor Workers' Act, we are at a loss to understand the total disregard of *Robison* and its progeny in the proceedings below. *Id.* 458.
>
> We do not lightly exclude workers from coverage as a matter of law under either statute. Thus, despite our continued insistence that a Jones Act 'seaman' and a 'crew member' excluded from the Longshoremen's Act are one and the same (in other words, that the statutes are mutually exclusive) we realize that, in a practical sense, a 'zone of uncertainty' inevitably connects the two Acts. Confronted by conflicting evidence concerning a worker's duties or undisputed

> evidence concerning an occupation that exhibits the characteristics of both traditional land and sea duties, a factfinder might be able to draw reasonable inferences to justify coverage under either statute." *Id.* 458.

In 1987, in the matter of *Pizzitolo v. Electro-Coal,* a jury verdict finding an electrical repairman who worked aboard coal transfer vessels to be a seaman was vacated by the trial judge who entered judgment not withstanding the verdict, holding that the worker engaged in an occupation listed under the Longshore Act is ineligible for benefits under the Jones Act because he is engaged in such occupation.

In 1987, some 15 years after the 1972 amendments to the Longshore Act, the Fifth Circuit examined Congressional intent and denied a repairman aboard a vessel the same seaman status that it had granted to a repairman aboard a vessel in the *McDermott* case in 1982, and like the ALJ in *McDermott,* displayed a total disregard for the importance of *Robison* and its progeny in the Fifth Circuit.

The Fifth Circuit's ruling in *Pizzitolo* unequivocally states that anyone who is covered under the Longshore Act is foreclosed from seeking Jones Act seaman status as a matter of law. *Id.* 981-982.

In view of *McDermott* and *Pizzitolo,* it appears that whether or not a man is a seaman in the Fifth Circuit depends upon the composition of the panel.

The best illustration of the conflict in the Fifth Circuit is set forth in *LeGros v. Panther Services Group, Inc.,* 863 F.2d 345 (5th Cir. 1988), in which rehearing en banc had been granted, however dismissed because of settlement.

In *LeGros,* the issue before the Fifth Circuit was whether the status of a worker found by the district court on the basis of sufficient evidence to be a seaman should have been determined by first asking whether the worker might have been a harbor worker, and if the answer were affirmative, concluding that this precluded a finding that he had seaman status:

> 'We conclude that the district court did not err in applying the traditional test of this circuit, set forth in Robison. . ." *Id* 346.

The Fifth Circuit, in *LeGros,* noted that where different panels of the court have applied different principles in earlier and later cases, they were obligated to follow the earlier line of cases when the conflict was pointed out, therefore subscribing to the principle of *Robison* and not *Pizzitolo* in *LeGros.* However, in the instant case, the latter principle, the *Pizzitolo* principle, was applied in denying seaman status. *Id* 350.

In *LeGros,* the Fifth Circuit majority reviewed Congressional intent as revealed in the Congressional reports. The Congressional reports specifically point out that a "master" or a "member of a crew" previously excluded under the Longshore Act would continue to be excluded under this Amendment, the exact opposite of Congressional intent determined by the *Pizzitolo* panel. *Id.* 350-351.

In *LeGros,* the court pointed out that in a number of other cases cited both before and after the adoption of the 1972 amendments to the Longshore and Harbor Workers' Act, that it had affirmed submission of the status issue to the factfinder without making non-harbor worker status a prerequisite.

Referring to *McDermott* the court explained that the *Robison* test is the standard for reviewing Longshore and Harbor Workers' Act and Jones Act determinations.

The majority in *LeGros* stated that the result in *Pizzitolo* was correct because the evidence was insufficient to warrant a finding that *Pizzitolo* was a seaman. However, the method of analysis utilized in *Pizzitolo* could not be reconciled with the method used in the earlier *Robison* line of cases. *Id.* 349

The dissent in *LeGros* states:

> "As a matter of circuit law, their approach is incorrect, indeed extraordinary. One panel of our court is not authorized to construe another panel's opinion in a way deliberately eschewed by the prior panel. They have thus confused an area of law that our earlier opinion sought to clarify." *Id* 352-353

And the confusion continues.

If the majority is correct in *LeGros* that the result in *Pizzitolo* was correct because there was insufficient evidence upon which to find seaman status, but that the method of analysis was incorrect, has not the court, in *Campo*, applied an incorrect legal standard when its opinion in *Campo* was based upon a wrong legal conclusion.

The court, in *Campo* stated:

> "Finding that Campo is precluded from seeking Jones Act seaman status because he is covered under the Longshore and Harbor Workers' Compensation Act (the LHWCA), we affirm."
>
> "In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 982 (5th Cir.) cert. denied, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978, we held

that coverage under the LHWCA precluded a finding of Jones Act seaman status."

SEAMAN UNDER THE JONES ACT SEAMAN IN BEING

For twenty-three years, the bastion of seaman status under the Jones Act, in the Fifth Circuit, *Robison* remained inviolate until *Barrett vs. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986).

Barrett, who was a seaman in being under this Court's ruling in *Desper vs. Starved Rock*, 342 U.S. 187, 72 S.Ct. 216, and under the Fifth Circuit's *Robison* was found to be a seaman during his last eight days of employment by the trier of fact. Thereafter, the matter was appealed and was affirmed. On rehearing and suggestion for rehearing en banc, the Fifth Circuit revisited *Robison*, and redefined and/or changed a rule which needed no changing, but not without a strong dissent.

The new rule in the Fifth Circuit referred to as the *Robison-Barrett Rule*, is in conflict with this Court's rule in *Desper vs. Starved Rock Ferry*.

Desper, who was a seasonal seaman, who worked aboard sight seeing boats during the season, was during the off-season a repairman on vessels which had been removed from navigation and which had been beached. Desper was injured during the off-season while doing repair work. *Id.* 217

This court, in *Desper*, stated "The fact that he had been or expected in the future to be a seaman does not render maritime, work which was not maritime in its

nature. This court pointed out that the question as to whether an individual is a seaman within the Jones Act depends largely on the facts of the particular case, and the activity in which such an individual was engaged at the time of the injury, so that one must be a seaman in being to come under the protection of the Jones Act." *Id.* 217.

While Barrett was a seaman in being at the time of his injury, he was denied seaman status, because during the year preceding his accident, he performed 70 to 80 percent of his work on platforms, and no more than 20 to 30 percent on vessels.

The Fifth Circuit, in the en banc consideration, modified *Robison*, but not without first misconstruing this Court's decision in *South Chicago*. *Id.* 1070.

The Fifth Circuit stated that whether Barrett was a crew member should have been determined in the context of his employment as a welder's helper during a one year period of employment preceding his accident. *Id.* 1074.

The dissent in *Barrett* stated: "*The majority refused to determine an injured worker's status as a crew member on the basis of what he was doing when he was injured, but insist that his duties must be decided on the basis of what he did in past, and holds in affect that unless the worker's permanent job assignment has changed, his duties and status at the time of the injury are irrelevant.*" *Id.* 1076.

The dissent pointed out that status of a crew member, vel non, should be determined by considering the transitory duration or fixed term of the assignment, the nature of his duties during it, and the relationship of those duties to the mission of the vessel.

CONCLUSION

The seamen of the Supreme Court-Senko, Rusin in *Warner,* Godsey and Reisch in *Wilkes* were not Z-card carrying members of the National Maritime Union who went out to the sea in ships.

Senko, Rusin, Godsey and Reisch were all bargees and harbor workers who would have been deprived of their maritime rights and remedies had this Court applied the statute without regard to the exception.

The Fifth Circuit has fallen into error by erroneous statutory interpretation in failing to apply the exception first.

STATUTORY EXCEPTIONS

> *"It has been said that an exception exempts something absolutely from the operation of a statute by express words in the enacting clause...an exception takes out of the statute something that otherwise would be part of the subject matter of it... (73 AM Jur 2d* §312)."

Because of the inconsistencies in the Fifth Circuit in three cases in which congressional intent is analyzed with conflicting conclusions and result, and further, because of the importance of the clarification of *Pizzitolo* and *Barrett* to petitioner, who has lost his rights and remedies by a misconstruction of the law, and because of the importance of both the Jones Act and the Longshoreman's and Harbor

Workers' Act to the entire maritime industry, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF
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By: _____
Evangeline M. Vavrick

PROOF OF SERVICE

I, Evangeline M. Vavrick, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Mr. George R. Alvey, Jr.
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By mailing a copy thereof, postage prepaid addressed to their respective offices, this 1st day of November, 1990.

_____

Evangeline M. Vavrick

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 89-3738
Summary Calendar

CURTIS CAMPO,
Plaintiff-Appellant,

VERSUS

ELECTRO-COAL TRANSFER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 89 351G)

(April 23, 1990)

Before WILLIAMS, SMITH, AND DUHE', Circuit Judges.

DUHE', Circuit Judge.[1]

In this maritime personal injury suit Curtis Campo

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeals the district court's grant of directed verdict on the issue of Jones Act seaman status. Finding that Campo is foreclosed from seeking Jones Act seaman status because he is covered under the Longshore and Harbor Workers' Compensation Act (the LHWCA), we affirm.

On motions for directed verdict we consider all of the evidence, not just that which supports Campo's case, in the light and with all reasonable inferences most favorable to Campo. If the facts and inferences point so strongly and overwhelmingly in favor of Electro-Coal that reasonable men could not arrive at a contrary conclusion, the directed verdict was proper. However, if there is substantial evidence opposed to the motion, the motion for directed verdict should have been denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury; there must be a conflict in substantial evidence to create a jury question. *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969).

Campo was employed by Electro-Coal Transfer at its cargo transfer terminal on the Mississippi River. Electro-Coal employees are divided into two categories, the operations division and the harbor boat division. Employees of the harbor boat division are specifically assigned to one of Electro-Coal's four harbor tugs. The operations department personnel board tugs, barges, and special purpose vessels to position barges and to assist the harbor tugs in opening and closing barge roll-top covers used to protect cargo in the barges. Generally, operations department employees are shoreside dock workers whose main function is to facilitate the loading and unloading of cargo.

Campo worked in the operations division as an operator/trainee and spent most of his time operating a continuous bucket unloader, a machine located on the dock

and designed to remove cargo from barges. Campo's position required that he conduct general housekeeping duties aboard the barges. Specifically, he had to tie and untie barges during the loading and unloading process, to open and close barge cargo covers, to keep the barges clean, to ensure that the barges did not take on water, to pump ballast, and to maintain the hydraulic winches to which the river barges to be loaded and unloaded are attached. In a 12 hour shift Campo worked with as many as 20 barges and spent as much as 40 percent of the time tying and untying barges. Campo also assisted harbor tugs in making and breaking tows, spotting river barges, and opening roll top covers of barges. In his eight years of employment with Electro-Coal, Campo substituted as a deckhand on a harbor vessel only twice. Beyond this, any activity performed by Campo while on any vessel was for the sole purpose of facilitating cargo operations.

Campo was injured when he fell into a barge which was moored at the dock and being prepared to take on cargo. A tug was positioned on one side of the barge, and a line stretched between Campo and the tug was attached to the cover to roll it open. When the cover was opened Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, it either jostled the barge or Campo misstepped, causing Campo to fall into the barge's cargo hold.

In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 982 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), we held that coverage under the LHWCA precluded a finding of Jones Act seaman status. *Williams v. Weber Management Services, Inc.*, 839 F.2d 1039, 1040 (5th Cir. 1987). Section 902(3) of the LHWCA defines an "employee" covered under the Act

as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . ." Campo's employment duties involved the loading and unloading of cargo, traditional longshoring activities. *Durr v. Global Marine, Inc.*, 673 F.2d 740, 741 (5th Cir. 1982). Because Campo was engaged in an occupation expressly enumerated in the LHWCA, the district court properly granted a directed verdict in favor of the defendant.

We find Campo's remaining arguments unavailing. Campo first contends that the district court abused its discretion by holding the pre-trial conference on the Friday before jury selection began on Monday. However, Campo fails to point to any prejudice resulting from the timing of the pre-trial conference; in addition, if Campo were surprised by what transpired at the conference, his remedy was to have moved for a continuance. Having failed to do so, Campo waived the right to assert this alleged error on appeal.

Campo also contends that the district court abused its discretion in condemning him to pay Electro-Coal's costs for duplicate copies of depositions of its employees taken by Campo. The law is clear that the court's order was proper because the copies were necessarily obtained for use in the case. *See West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co.*, 834 F.2d 1232, 1237-38 (5th Cir. 1988). Campo's two final points, that the court erred in excluding certain evidence and in limiting the consideration of Campo's employment duties to the two years directly preceding the accident, are rendered moot because the court considered all of the evidence before him in granting the directed verdict.

For the foregoing reasons, the judgement of the district court is in all respects

AFFIRMED.

July 23, 1990

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CURTIS CAMPO	*	CIVIL ACTION
VERSUS	*	NO. 89-351
ELECTRO-COAL TRANSFER CORP.	*	SECTION "G"

MEMORANDUM AND ORDER

Plaintiff, Curtis Campo, commenced this civil action under the Jones Act, 46 U.S.C. § 688, against defendant, Electro-Coal Transfer Corp., to recover for personal injuries sustained after he fell into the cargo hold aboard the Barge SER 126B. A jury trial was held on September 27 and 28, 1989. At the close of plaintiff's evidence on the issue of the plaintiff's status as a Jones Act seaman, the defendant's moved for a directed verdict pursuant to Fed. R. Civ. P. 50(a). I granted the motion for directed verdict because on the facts presented at trial, reasonable minds could not differ as to the finding that Curtis Campo was a longshoreman and not a "seaman" as defined by the Fifth Circuit in *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), and *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986) (en banc). Thus, plaintiff is not entitled to bring a claim under the Jones Act.

In *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969), the Fifth Circuit set forth the legal standard for granting a directed verdict or a judgment notwithstanding the verdict. The *Boeing* court stated:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. . . . There must be a conflict in substantial evidence to create a jury question.

Id. at 374. The *Boeing* standard applies to a motion for directed verdict denying Jones Act seaman status. *See Wallace v. Oceaneering International*, 727 F.2d 427, 432 (5th Cir. 1984).[1]

The uncontroverted facts in this case demonstrate

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[1] *See also Lormand v. Superior Oil Co.*, 845 F.2d 536, 539 (5th Cir. 1987) (summary judgment proper where no reasonable evidentiary basis supports a jury finding that the injured worker is a seaman), *cert. denied*, 108 S. Ct. 739 (1988); *Kerr-McGee Corp. v. Ma-ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987) (directed verdict proper when record demonstrates that reasonable persons could not draw conflicting inferences which might lead to another conclusion); *Munguia v. Chevron Co., U.S.A.*, 768 F.2d 649 (5th Cir. 1985) (directed verdict proper when there is no reasonable evidentiary basis for a jury's verdict), *cert. denied*, 475 U.S. 1050 (1986).

that the plaintiff, Curtis Campo, worked as a longshoreman. Defendant, Electro-Coal, hired plaintiff to load and unload bulk cargo, classic stevedoring work. To facilitate the loading and unloading operations, plaintiff boarded barges, removed hatch covers, pumped ballast, and caught and released lines. All of these activities were performed in furtherance of the loading and unloading operations. In fact, at least three times during the trial, plaintiff himself testified that any activity performed by him while on different vessels was done for the sole purpose of facilitating the loading and unloading operations.

The first issue for determination in an action brought under the Jones Act is whether the plaintiff is a seaman. Not every maritime worker or person exposed to nautical perils is covered by the Jones Act. *See Munguia v. Chevron Co., U.S.A.*, 768 F.2d 649, 651 (5th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986). If the plaintiff is not a seaman, he is not entitled to bring a suit under the Jones Act. In *Offshore Co. v. Robinson*, 266 F.2d 769, 779 (5th Cir. 1959), the Fifth Circuit set forth the test for determining seaman status. The court subsequently modified the *Robison* test in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986) (en banc). In order to be a seaman, the plaintiff must show that he was permanently assigned to a vessel or performed a substantial part of his work on a vessel or an identifiable group of vessels acting together or under one party's control, and that his work contributed to the function of the vessel or group of vessels, the accomplishment of its mission, or the operation or welfare of the vessel or group in terms of its maintenance during either movement or anchorage. *See Robison*,. 266 F.2d at 779; *Barrett*, 781 F.2d at 1074.[2]

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[2] For other cases discussing the *Robison-Barrett* test, see *Legros v. Panther Services Group, Inc.*, 863 F.2d 345 (5th Cir. 1988); *Chauvin v*

In *Jones v. Mississippi River Grain Elevator Co.*, 703 F.2d 108 (5th Cir.), *cert. denied*, 464 U.S. 856 (1983), the court affirmed the district court's summary judgment dismissal of the plaintiff's Jones Act claim because the plaintiff was not a seaman. Jones, who worked as a bargeman, performed several duties on the variously-owned barges that came to his employer's facility. Jones placed the sling of a mooring cable onto a cleat, removed the covers from the grain barges' hoppers so that the grain could be removed, and replaced the covers on the grain hopper after the barge was unloaded. "Jones was assigned on a random basis to perform unloading-preparation duties on a considerable number of variously-owned vessels of others . . . ." *Id.* at 109. The court held that Jones was not a seaman because "he did not possess the requisite criterion of a more or less permanent assignment to a vessel or an identifiable fleet or group of vessels." *Id.*

Similarly, in *White v. Valley Line Co.*, 736 F.2d 304 (5th Cir. 1984), the court agreed that the plaintiff was not a seaman and affirmed the district court's summary judgment. White worked as a fleetman at the defendant's fleeting facility. He washed vessels, pumped ballast, and performed minor repairs on the barges. Defendant serviced its own barges as well as the barges of numerous other barge lines. White spent approximately fifty percent of his time tying and releasing tow lines on barges docked at the

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Footnote 2 continued.

Sanford Offshore Salvage, Inc., 868 F.2d 735, 737-38 (5th Cir. 1989); *Kerr-McGee Corp. v. Ma-ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987); *Lirette v. Sperry Sun, Inc.*, 831 F.2d 554 (5th Cir. 1987); *Waguespack v. Aetna Life & Causalty Co.*, 795 F.2d 523, 525-26 (5th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Balfer v. Mayronne Mud & Chemical Co.*, 762 F.2d 432 (5th Cir. 1985); *White v. Valley Line Co.*, 736 F.2d 304, 305-06 (5th Cir. 1984); *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307, 309-10 (5th Cir. 1984).

facility. During the other fifty percent of his time, he washed and repaired the barges as needed. The Fifth Circuit held that White was neither permanently attached to a vessel nor did he perform a substantial part of his work on board a vessel. *Id.* at 306. In holding that White was not a seaman, the court stressed the transitory nature of White's contacts with the vessels and his random and impermanent assignment to any vessel. The court stated that "the question of substantiality comprehends more than a mere quantitative assessment of where the claimant spent the greater part of his working day. . . . [T]he issue of status should be addressed with reference to the nature and locations of his occupation taken as a whole." *Id.* at 306 (citations omitted).

Additionally, in *Balfer v. Mayronne Mud & Chemical Co.*, 762 F.2d 432 (5th Cir. 1985), the court affirmed the district court's summary judgment determination that the plaintiff was not a Jones Act seaman. Mayronne, who was employed as a roustabout, claimed seaman status because his work entailed loading heavy sacks of chemicals and other items onto navigable vessels docked on navigable waterways. The court held that Balfer was clearly a longshoreman and not a seaman. The sporadic work aboard vessels was part of his loading and unloading duties; thus, it did not satisfy the *Robison* test.

In this case, Campo performed classic stevedoring duties: he loaded and unloaded cargo. The only activities performed on barges, such as catching lines and moving hatch covers, were done in preparation for the loading operations. This plaintiff, like the plaintiffs in *Jones*, *White*, and *Balfer*, fails to qualify as a Jones Act seaman. The mere fact that plaintiff removed hatch covers, pumped ballast, boarded barges, and caught lines does not establish that he was a seaman for the purposes of the Jones Act.

Plaintiff also fails to establish that he was permanently attached to a vessel or an identifiable fleet of vessels, or that he performed a substantial part of his work on vessels. In *Waguespack v. Aetna Life & Causalty Co.*, 795 F.2d 523, 525-26 (5th Cir. 1986), *cert. denied* 479 U.S. 1094 (1987), the court affirmed the trial court's summary judgment dismissing plaintiff's Jones Act claim because plaintiff was not a seaman. Waguespack's work as a bargeman for Peavey Company entailed removing the covers of the variously-owned grain barges after they entered the unloading slip and replacing the covers once the mechanical arm removed the grain. Plaintiff stood on a small work platform while he removed these barge covers. Additionally, plaintiff attached the barge covers to the hooks on the end of lines connected to the gantry. The *Waguespack* court held that the plaintiff was not a seaman because he was not permanently assigned to a vessel. The court stated, "We reject the notion that fleet of vessels means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated." *Id.* at 526 (citing *Barrett*, 781 F.2d at 1074). The court also held that the small work platform was not a vessel because it was almost exclusively used to facilitate the unloading of cargo from the grain barges. *Id.* at 525.

Similarly, in *Munguia v. Chevron Co. U.S.A.*, 768 F.2d 649 (5th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986), the court affirmed the district court's judgment notwithstanding the verdict entered after the jury decided that the plaintiff was a seaman. Munguia, employed as a roustabout, worked at various places in the field or on various wells. He would load all the tools and equipment on a boat, and once the boat reached its destination, he would unload all of the tools and equipment. Occasionally, he

cleaned the boats and performed minor maintenance work. The court held that Munguia was not assigned to a fleet of vessels; rather, he was randomly assigned to a different vessel everyday. Additionally, the court held that he did not perform a substantial part of his work on vessels.[3]

In *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307 (5th Cir. 1984), the court affirmed a district court's summary judgment dismissal of plaintiff's Jones Act claim because the plaintiff failed to qualify as a seaman. Buras worked as a coal sampler and temperature taker. During this employment, he tested coal on various barges, ships, and land-based stockpiles. The court noted that Buras was randomly assigned to a vessel or land-based stockpile and that his contact was short in duration and limited to the administration of the temperature test. The court then held that Buras was not permanently assigned to a vessel or fleet of vessels becauses his connection was merely transitory. The court also rejected Buras' argument that his contacts with vessels were substantial, and stated that incidental and temporary duty will not suffice to meet the substantiality requirement. *Id.* at 311.

The Fifth Circuit again considered the issue of permanent assignment to a vessel in *Lirette v. N.L. Sperry Sun, Inc.*, 831 F.2d 554 (5th Cir. 1987). The *Lirette* court held that the plaintiff was not a Jones Act seaman because the twenty-three special purpose drilling rigs he worked aboard were not under the common ownership or control of

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[3] *See also Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981), *cert. denied*, 454 U.S. 818 (1981). In *Guidry*, the court affirmed the district court's summary judgment dismissal of plaintiff's Jones Act claim because the plaintiff was not a seaman. The court held that the plaintiff was not permanently attached to a vessel because he never continually or regularly worked on a particular rig, and he was randomly assigned to vessels.

his employer nor did they share a nexus that would support a finding that they were a fleet. The court noted the limited exception provided in *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). In *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307 (5th Cir. 1984), the court clarified the *Bertrand* exception. The *Buras* court stated,

> Although *Bertrand* thus expanded the concept of a fleet to encompass vessels used, but not owned or chartered, by the employer, we do not believe that it can be fairly read so broadly as to confer seaman status on every worker whose duties place him aboard a large number of randomly-owned and controlled vessels for short periods of time that aggregate to comprise a substantial portion of his working time, nor do we believe that *Bertrand* rejected the identifiable or recognizable fleet requirement established by our prior cases.

Burus, 736 F.2d at 311. The *Lirette* court further noted that the limited exception established in *Bertrand* involves persons who perform traditional duties of blue water seamen. In this case, Campo's duties, like the duties performed by the plaintiff in *Lirette*, closely resemble those of a transitory maritime worker. "[T]he distinction between seamen and transitory maritime workers is fundamental and may not be blurred." *Lirette*, 831 F.2d at 557.

In this case, plaintiff was not permanently assigned to a vessel or an identifiable fleet of vessels. Each day, plaintiff loaded and unloaded cargo on randomly assigned barges or vessels. These random assignments fail to satisfy the fleet of vessels requirement of *Robison*. Although plaintiff participated in topping-off operations, he was not permanently assigned to work on this topping-off vessel. In

fact, he only worked on the topping-off vessel four times in two years. Plaintiff was neither permanently assigned to a vessel nor did he perform a substantial part of his work on a vessel. Thus, plaintiff is not a seaman entitled to Jones Act relief.

Moreover, plaintiff's work activities, loading and unloading cargo, clearly demonstrate that he was a longshoreman. In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S. Ct.1013 (1988), the court held that when a workman engaged in one of the occupations enumerated in the Longshore and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. § 901, is injured, he is unqualifiedly covered by the LHWCA and therefore, ineligible for benefits under the Jones Act. In light of the plaintiff's employment as a longshoreman, he is ineligible for relief under the Jones Act.

Plaintiff cannot bring a claim under the Jones Act because he fails to qualify as a seaman under the *Robison-Barrett* test. Additionally, *Pizzitolo* precludes this plaintiff from bringing a Jones Act claim because he is unqualifiedly covered under the LHWCA. Accordingly, plaintiff's Jones Act claim is DISMISSED WITH PREJUDICE at his costs.

Let judgment be entered accordingly.

/s/ Morey L. Sear

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3738

Filed SEP 7 1990

CURTIS CAMPO,
Plaintiff-Appellant,

versus

ELECTRO-COAL TRANSFER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

(Opinion 7/23/90, 5 Cir., 198__, ____F.2d____)

Before WILLIAMS, SMITH, AND DUHE, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Judge Duhe
United States District Judge

Supreme Court, U.S.
FILED
JAN 15 1991
JOSEPH F. SPANIOL, JR
CLERK

NOs. 90-722 & 90-956

In the Supreme Court of the United States

OCTOBER TERM, 1990

CURTIS CAMPO, JR.
Plaintiff-Petitioner

versus

ELECTRO-COAL TRANSFER CORPORATION, INC.
Defendant-Respondent

NATIONAL UNION FIRE INSURANCE COMPANY
Intervenor-Petitioner

versus

CURTIS CAMPO, JR., Plaintiff-Petitioner, and
ELECTRO-COAL TRANSFER CORPORATION, INC.,
Defendant-Respondent

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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QUESTIONS PRESENTED

Petitions No. 90-722 and 90-956 present the same questions arising from the same case. These questions are:

A. Whether the Circuit Court of Appeals for the Fifth Circuit was correct in affirming the district court's directed verdict in favor of Respondent on the issue of Petitioner's lack of seaman status for the purpose of asserting a remedy under the Jones Act, 46 U.S.C. § 688, and finding that Petitioner was engaged in "maritime employment" as defined in Section 902(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

B. Whether the Circuit Court of Appeals for the Fifth Circuit correctly applied Supreme Court precedent, the Jones Act, and the Longshore and Harbor Workers' Compensation Act in finding that Petitioner, a shore-based terminal worker who assisted with the loading and unloading of vessels, was not a Jones Act seaman, but rather a worker covered under the Longshore and Harbor Workers' Compensation Act.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT

I. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW 4

II. THE COURTS BELOW CORRECTLY APPLIED BOTH THE JONES ACT AND THE LHWCA IN DETERMINING THAT CAMPO IS COVERED UNDER THE LHWCA 5

A. CAMPO WAS NOT A JONES ACT SEAMAN 5

B. CAMPO WAS A SHORE-BASED TERMINAL WORKER COVERED BY THE LHWCA 7

C. SUPREME COURT PRECEDENT 8

CONCLUSION 12

APPENDIX: LISTING OF PARENT AND SUBSIDIARY COMPANIES IN ACCORDANCE WITH SUPREME COURT RULE 29.1 ..... A-1

TABLE OF AUTHORITIES

CASES: **Page**

Allen v. Seacoast Products, Inc., 623 F.2d 355 (5th Cir. 1980) 6

Anderson v. Liberty Lobby, 477 U.S. 242 . . . (1986) . . . 6

Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986) 5

Chesapeake and Ohio Railway Company v. Schwalb, 110 S.Ct. 381 (1989) 9-10

Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952) 11

Director v. Perini North River Associates, 459 U.S. 297 (1983) 9

Galloway v. United States, 319 U.S. 372 (1943) 6

Grimes v. Raymond Concrete Pile Company, 356 U.S. 252 (1958) 11

Herb's Welding v. Gray, 470 U.S. 414 (1985) 8,10

Improvement Co. v. Munson, 14 Wall. 442, 448 (1872) 6

Landry v. Hunthnance Drilling Company, 889 F.2d 1469 (5th Cir. 1989) 6

Layne & Bowler Corp v. Western Well Works, Inc., 261 U.S. 378 (1923) 5

Legros v. Panther Services Group, Inc., 874 F.2d 953 (5th Cir. 1989) 11

TABLE OF AUTHORITIES (continued)

CASES: **Page**

Norton v. Warner Co., 321 U.S. 565 (1944) 8,11

Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959) 5

P.C. Pfeiffer Company v. Ford, 444 U.S. 69 (1979) . . 8,10

Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979) 6

Pizzotolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), *cert denied*, 108 S.Ct. 1013 (1988) 7

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 5

Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957) 11

Swanson v. Marra Brothers, Inc., 328 U.S. 1 (1946) 8

Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) 8

OTHER AUTHORITIES:

H.R. Rep. No. 92-1441, p.11 (1972) 8

Jones Act, 46 U.S.C. Sec. 688 1

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901 *et seq* . . . . . *passim*

Rule 10 of Supreme Court 4

STATEMENT OF THE CASE

Curtis Campo, Jr., Petitioner, brought suit for personal injuries against his employer, Electro-Coal Transfer Corporation ("Electro-Coal"), under the Jones Act, 46 U.S.C. Sec. 688, and the general maritime law. After hearing all of plaintiff's evidence on the issue of seaman status, the United States District Court for the Eastern District of Louisiana entered a directed verdict in favor of Electro-Coal. Construing all evidence in favor of Petitioner, the district court concluded that Petitioner was not a seaman under the Jones Act and that Campo's remedy against his employer was under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901 *et seq.* ("LHWCA"), since the work Campo performed related to the loading and unloading of vessels, the traditional function of a longshoreman/harbor worker. Appendix at A-6.[1] This determination was affirmed by the United States Court of Appeals for the Fifth Circuit. Appendix at A-3 - A-4.

Petitioner, National Union Fire Insurance Company ("National Union"), is the Longshore and Harbor Workers' Compensation insurer of Electro-Coal. National Union filed an Intervention in Campo's suit seeking recoupment of compensation and medical benefits received by Campo in accordance with the LHWCA in the event it was determined that Campo was a seaman. National Union filed a separate Petition for Certiorari adopting by reference the arguments and authorities cited in Campo's Petition for Certiorari.

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[1] Petitioners in No. 90-722 and 90-956 filed identical Appendices with the same pagination. The opinions of the court of appeals and district court are unpublished and are reproduced in both Appendices at A-1 and A-6 respectively, and citations to these opinions are in the form "Appendix at A-____."

The uncontested facts established that Campo was a shore-based terminal worker who assisted in loading and unloading bulk cargo at Electro-Coal's terminal in Plaquemines Parish, Louisiana. Electro-Coal's facility is used to transfer and store coal and other cargo. The terminal in question consists of shore side buildings, a coal storage area, and a dock. Electro-Coal routinely transfers coal from vessel to vessel and between vessels and the shore-side storage area. Barges loaded with coal and other cargo to be discharged are routinely tied to the dock adjacent to the terminal. The cargo is then loaded either onto other barges or seagoing vessels, or stored in Electro-Coal's terminal. Cargo is loaded and unloaded by use of large electric powered machines, various cranes, and a series of powered conveyor belts.

Electro-Coal's terminal workers are divided into two divisions, an operations division and a harbor boat division. Campo was assigned to the operations division and was classified as an operator trainee at the time of his accident. The operations division consists of shore-based dock workers who are involved with the handling, loading and unloading of cargo. Appendix at A-2. Campo's primary duties concerned the operation of the different types of equipment used in the cargo transfer process. This equipment is located on the dock and on land. To operate the machinery Campo would sit in a cab, above the dock, and pull various levers to move cargo onto conveyor belts or to allow the cargo to be let out of the machines into the barge.

The harbor boat division at Electro-Coal consists of a foreman, tug boat operators and deckhands who are permanently assigned to specific vessels. Campo was not assigned to this division. The harbor boat division runs and maintains Electro-Coal's four harbor boats. No evidence was presented suggesting that Campo was permanently

assigned to work aboard any of these vessels as a member of the crew. Appendix at A-11.

Like other marine terminals, thousands of barges and vessels call annually at the Electro-Coal facility to discharge or to load cargo. These cargo carrying vessels, both river and ocean going, are owned and operated by many different companies. None of the cargo carrying vessels are owned by Electro-Coal, with the exception of a single barge, which is used for maintenance and clean up work.

In order to facilitate loading and unloading operations, Campo occasionally boarded barges, removed hatch covers, pumped ballast, and caught and released lines. Campo, however, admitted that these activities were for the sole purpose of facilitating the loading and unloading of cargo. Appendix at A-8. Campo spent most of his time operating a continuous bucket loader, a machine located on the dock and designed to remove cargo from barges. Appendix at A-3 - A-4.

Campo was injured when he fell into a barge, moored at a dock, which he was aboard preparing it to take on cargo. Appendix at A-3. A tug was positioned alongside the barge. A line from the tug was used to open a hatch cover on the barge. After the cover was opened, Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, Campo somehow fell into the barge's cargo hold. Appendix at A-3. There was no evidence or proof that Campo was permanently assigned to the tug, or any other vessel, as a crewmember nor did Campo perform a substantial amount of his work on vessels. Appendix at A-11.

Campo brought suit against Electro-Coal under the

Jones Act, contending that he was a "seaman." Electro-Coal defended contending, *inter alia*, that Campo, a shore-based terminal worker assisting in the loading and unloading of vessels, was not a Jones Act seaman, but was covered by the LHWCA and engaged in "maritime employment" as defined in Section 902(3) of the LHWCA. The district court directed a verdict in favor of Electro-Coal at the close of Campo's case. This determination was affirmed by the Circuit Court of Appeals for the Fifth Circuit.

ARGUMENT

1. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW.

The questions raised by Petitioners do not merit review nor do Petitioners articulate any "special and important reasons" required by Rule 10 of the Supreme Court of the United States to support their argument that this Court should exercise its discretionary power of review. Rule 10 implies that there must be a substantial federal question presented to warrant the granting of certiorari. The questions presented by Petitioners relate solely to factual issues, and do not involve any issues of constitutional law, federal statutory law, or federal maritime law. The court of appeals' decision is not in conflict with a decision of this Court or of another federal circuit court of appeals, nor has the court of appeals decided a federal question in a way which conflicts with a state court of last resort. There is no evidence that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision. In fact, as shown below, the decisions of the lower courts are in full accord with the LHWCA, the Jones Act, and the precedents of this Court.

Certiorari should not be granted "except in cases involving principals the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp v. Western Well Works, Inc.*, 261 U.S. 378, 393 (1923)). No such reasons exist in this case. Petitioners are merely dissatisfied with the results below as it affects them as litigants and are attempting to reargue the case which Petitioners lost below on undisputed facts. This Court has stressed that it does not "sit for the benefit of particular litigants." *Rice*, 349 U.S. at 74.

II. THE COURTS BELOW CORRECTLY APPLIED BOTH THE JONES ACT AND THE LHWCA IN DETERMINING THAT CAMPO IS COVERED UNDER THE LHWCA.

A. CAMPO WAS NOT A JONES ACT SEAMAN.

Under the Fifth Circuit's precedents of *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), and *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), a maritime worker qualifies as a seaman if:

1. He was permanently assigned to a vessel or performed a substantial part of his work on a vessel or on an identifiable fleet of vessels acting together or under one control and;

2. The work he performed contributed to the function of the vessel or the accomplishment of its mission.

781 F.2d at 1074 - 76. The undisputed facts established

that Campo was not a crew member of any vessel, nor was he assigned permanently to any vessel or fleet of vessels, nor did he perform significant work on vessels. Appendix at A-13 - A-14.

The requests for certiorari rest on the grounds that in most cases the question of seaman status should be determined by the jury. This completely undermines the purpose of a directed verdict. In Jones Act cases "a mere scintilla" of evidence is insufficient to present a question for a jury and there must be a conflict in substantial evidence to create a jury question. A directed verdict is appropriate where there is a complete absence of probative facts supporting plaintiff's position. *See, e.g., Landry v. Hunthnance Drilling Company*, 889 F.2d 1469, 1470 (5th Cir. 1989); *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980).

The right to a jury trial does not negate the authority of the federal courts to direct a verdict or enter a judgment notwithstanding the verdict for insufficiency of evidence. *Galloway v. United States*, 319 U.S. 372, 389 (1943) (federal courts have power to direct verdict for insufficiency of evidence even though claimant has right to jury trial); *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 333-35 (1979) (offensive use of collateral estoppel does not violate defendant's right to trial by jury). Petitioners' arguments ignore that it is proper to direct a verdict when, under the governing law, "there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby*, 477 U.S. 242, 250-51 (1986). In *Anderson*, this Court noted that "judges are not required to submit a question to the jury. . . unless the evidence is of such a character that it would warrant the jury finding a verdict in favor of that party." 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872)). Campo put forth no evidence

from which a jury could infer that he was permanently assigned to a vessel or fleet of vessels.

B. CAMPO WAS A SHORE-BASED TERMINAL WORKER COVERED BY THE LHWCA.

All of the evidence presented indicated that Campo was a shore-based harbor worker who was involved with the loading and unloading of vessels, classic stevedoring work covered by the LHWCA. Appendix at A-2-A-4. Campo was engaged in "maritime employment" on navigable waters within the meaning of Section 902(3) of the LHWCA, Title 33 United States Code, making the LHWCA Campo's remedy against Electro-Coal. Appendix A-4. Section 902(3) of the LHWCA provides:

> The term "employee" means any person engaged in maritime employment, *including* any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, ship builder, and ship breaker. . . .

(emphasis added.)

Under *Pizzotolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988), and other precedents of this Court, Campo is precluded from recovering under the Jones Act since the Jones Act and the LHWCA are mutually exclusive statutes. In *Pizzotolo*, another claim involving Electro-Coal's terminal, the plaintiff was a shore-based terminal worker, like Campo. Pizzotolo was injured as he attempted to repair one of the conveyors used to load and unload barges. The court held that plaintiff was a shore-based harbor worker who had limited contact with vessels and concluded that Pizzotolo

was not a seaman.

The decisions below are in accord with the decisions of this Court holding that the Jones Act and the LHWCA are mutually exclusive statutes. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 n.12 (1971); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 6-7 (1946); *Norton v. Warner Co.*, 321 U.S. 565, 570 (1944).

C. SUPREME COURT PRECEDENT.

Petitioners ignore the recent opinions of this Court interpreting the LHWCA which resolve the questions raised by Petitioners. These decisions establish that Campo was covered under the LHWCA. In *Herb's Welding v. Gray*, 470 U.S. 414 (1985), the Court ruled that the term "maritime employment" appearing in Section 902(3) of the LHWCA *was not* limited to the occupations therein enumerated: " 'Maritime employment' is not limited to the occupations specifically mentioned in § 2(3). . . ." 470 U.S. at 423. Further, by use of the word "including" in Section 902(3), "Congress indicated that the specifically mentioned occupations are not exclusive." *Id.* at 423 n.9 (citing *P.C. Pfeiffer Company v. Ford*, 444 U.S. 69, 77 - 78 n.7 (1979) and H.R. Rep. No. 92-1441, p.11 (1972)). In *Herb's Welding*, this Court found the scope of coverage of the LHWCA to be:

> [The LHWCA,] as amended, 33 U.S.C. § 901 *et seq.*, provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or

> building a vessel, § 903(a). Thus, a worker claiming under the Act must satisfy both a "status" and a "situs" test.

470 U.S. at 415-16 (footnote omitted).

Campo meets both the "situs" and "status" requirements of the LHWCA. Campo's accident occurred on navigable waters aboard a barge which he was aboard preparing for loading. Appendix A-3-A-4. In *Director v. Perini North River Associates*, 459 U.S. 297 (1983), the claimant was injured on the deck of a cargo barge afloat in the Hudson River, while giving directions to a crane operator. A line which was being used to keep the cargo in place snapped as the cargo was in the process of being unloaded. After an extensive review of the history and purpose of the LHWCA, the Supreme Court held that the claimant was a covered employee under Section 902(3) of the LHWCA:

> We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3) and is covered under the LHWCA, providing, of course, that he is an employee of a statutory "employer" and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their duties upon navigable waters.

Id. at 324 (footnotes omitted).

In *Chesapeake and Ohio Railway Company v.*

Schwalb, 110 S.Ct. 381 (1989), this Court again found that shore-based terminal workers who were injured at facilities where coal was transferred to and from vessels were covered by the LHWCA, and *not* the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51-60, which the Jones Act incorporates and follows. Much like Electro-Coal's terminal, the terminals in *Schwalb* consisted of conveyor belts which were used to load and unload coal from vessels. The workers in *Schwalb* performed general housekeeping services, repairs, maintenance, and other services which were integral to the loading and unloading operations of their employers, and were hence covered by the LHWCA:

> The employment that is maritime within the meaning of § 902(3) expressly includes the specified occupations but obviously is not limited to those callings. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, n.9, 105 S.Ct. 1421, 1427, n.9, 84 L.Ed.2d 406 (1985); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77-78, n. 7, 100 S.Ct. 328, 334, n. 7, 62 L.Ed.2d 225 (1979). . . .
>
> * * *
>
> Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. *Such employees are engaged in activity that is an integral part of and essential to those overall processes.* That is all that § 902(3) requires. Coverage is not limited to employees who are denominated "longshoremen" or who physically handle the cargo.

110 S.Ct. at 384-85 (emphasis added). There can be no doubt that the work Campo performed was "an integral or essential part of loading or unloading a vessel." *Id.* at 384.

Petitioners' proposed interpretation of the LHWCA is contrary to the express wording of the LHWCA and the precedents of this Court, and would result in every shore-based harbor worker being deemed a seaman. The lower courts' determinations are in full accord with the LHWCA and the decisions of this Court.

The cases relied on by Petitioners are inapposite and predate the above-mentioned decisions of this Court. The original opinion in *Legros v. Panther Services Group, Inc.*, 874 F.2d 953 (5th Cir. 1989), was vacated by the Fifth Circuit when it granted rehearing *en banc*. 874 F.2d at 954. In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), the worker was found not to be a seaman where the work was performed on a vessel out of navigation with "neither captain nor crew." 342 U.S. at 190-91. In *Norton v. Warner Co.*, 321 U.S. 565 (1944), the plaintiff, unlike Campo, "had no duties with the handling of cargo and no shore duties." 321 U.S. at 568. *Grimes v. Raymond Concrete Pile Company*, 356 U.S. 252 (1958), involved a plaintiff who was assigned to work on a single vessel on the high seas. Similarly, *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), did not involve a shore-based terminal worker, but rather concerned a crewmember assigned to a dredge who performed deckhand duties and had "a significant navigational function." 352 U.S. at 373-74.

CONCLUSION

The questions presented by the Petitioners do not merit review because, as a matter of law and fact, Campo was not a Jones Act seaman since he was not permanently assigned to a vessel or fleet of vessels. Campo was covered under the LHWCA since his work involved the loading and unloading of barges at a marine terminal on the Mississippi River. The decisions of the lower courts correctly applied the Jones Act, the LHWCA, and the precedents of this Court. The questions raised by Petitioners have been resolved by the earlier decisions of this Court which interpret the LHWCA and discuss the term "maritime employment" as used in Section 902(3) of the LHWCA.

Respectfully submitted:

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APPENDIX A

APPENDIX: Listing of Parent and Subsidiary Companies in Accordance with Supreme Court Rule 29.1:

Electro-Coal Transfer Corporation
TECO Energy, Inc.